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No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

KEITH H. GUSTAFSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the court of appeals err by holding that marihuana violations can be "predicate acts" sufficient to support a RICO conviction; by ignoring Congress' deliberate decision to remove marihuana from the list of offenses set forth in the racketeering statute; and by failing to recognize that the special provisions Congress made for marihuana offenses in drug laws enacted prior to 1970, and in comprehensive drug reform legislation enacted in 1970, are inconsistent with a judicial decision that marihuana falls within the racketeering statute?

2. Did the court of appeals err in basing its decision that marihuana offenses can be "predicate acts" sufficient to support a racketeering conviction on dictum in a prior case which had been cited in only one other case without an analysis of either the statute or its legislative history rather than looking to the clear Congressional intent that is demonstrated in the language and legislative history of the racketeering statute?

PARTIES BELOW

In addition to the United States of America, the following persons were parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit, the court whose judgment is sought to be reviewed:

Keith H. Gustafson
Chan Walker Zielie
Thomas David Wilkerson
Robert Walter Govern
Leon D. Mausser

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OPINION BELOW

The opinion of the Court of Appeals is reported at 734 F.2d 1447 (11th Cir. 1984). It is reproduced in the Appendix to this Petition at App. 1-28.

JURISDICTION

The judgment sought to be reviewed by writ of certiorari was dated and entered June 25, 1984. Rehearing and rehearing *en banc* were denied by an order of the Eleventh

Circuit issued and filed July 30, 1984. App. 2. The statutory provision which confers on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. §1254(1) (1982).

STATUTES INVOLVED

18 U.S.C. §1961. Definitions

As used in this chapter—

(1) "racketeering activity" means . . .

(D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

. . . .

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity . . . .

18 U.S.C. §1962. Prohibited activities

. . . .

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

STATEMENT OF THE CASE

In 1982 an 18-count indictment was returned by a grand jury in the Middle District of Florida. Keith Gustafson, petitioner, one of 13 defendants, was charged in three counts: Count 1 alleged a conspiracy in violation of the racketeering statute [RICO, 18 U.S. §§1961, 1962(d) (1976)]; count 2 charged a substantive RICO violation [18 U.S.C. §§1961, 1962(c) (1976)]; and count 16 charged a marihuana conspiracy [21 U.S.C. §846 (1976)]. In its presentation in the district court, which had jurisdiction pursuant to 18 U.S.C. §3231 (1982), the government adduced evidence that the defendants associated together to profit from the large-scale distribution of marihuana. Five defendants, including petitioner, were tried together. Petitioner was convicted on all counts by a jury on November 10, 1982. On December 28, 1982 judgment was entered and petitioner was sentenced to 12 years imprisonment and fined $35,000.

Petitioner sought to overturn his racketeering conviction in the court of appeals on the ground, *inter alia,* that marihuana offenses cannot be used as predicate offenses under the RICO statute. He briefed and argued the issue in the trial court and the court of appeals; both decided it against him. The court of appeals devoted only one footnote to the issue and cited only one case, *United States* v. *Phillips,* 664 F.2d 971, 1040 (5th Cir. 1981) (Unit B), *cert. denied,* 457 U.S. 1136 (1982), in support of its disposition of the issue. *United States* v. *Zielie,* 734 F.2d 1447 (11th Cir. 1984). App. 1.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The Court of Appeals for the Eleventh Circuit has held that the government may charge a defendant with violating the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970, 18 U.S.C. §§1961-1968 (1982), by alleging that he committed two offenses involving marihuana while he was associated with an enterprise. Petitioner believes that the court of appeals ignored this Court's opinions regarding proper interpretation of federal statutes, rendered its decision in the face of clear legislative history compelling a different conclusion, failed completely to address that legislative history, and ultimately based its decision on prior cases that never addressed the statutory questions which petitioner raised in the court of appeals.

The government in the Eleventh Circuit continues to charge RICO violations based on marihuana offenses,[1] and the court of appeals' decision indicates that it will permit the government to do so. Petitioner urges this Court to grant review to decide whether the court of appeals has substituted its own view of the proper reach of RICO for the reach that Congress chose in 1970.

This Court has said time and again that its role is to construe the statutes that Congress has enacted, not to write laws for Congress. Just last term, in *Russello* v. *United States*, 104 S. Ct. 296 (1983), the Court emphasized that when interpreting the RICO statute, a court must look to see what Congress did in enacting the statute. In petitioner's case, the court of appeals declined to begin

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[1] *See, e.g., United States* v. *Bascaro*, No. 82-5547 (11th Cir. argued May 23, 1984); *United States* v. *Acosta*, No. 83-3045 (11th Cir. Appellee's brief filed July 11, 1984); *United States* v. *Erp*, No. 83-3611 (11th Cir. Appellee's brief filed August 31, 1984).

with the statutory language and to consider how to interpret that language in light of the background and history of the racketeering statute. Instead, it cited its prior decision, which had examined neither the language nor the history of the statute and which had rested, in fact, solely on dictum in a prior case which did not even purport to address the issue that petitioner presented.

A. The Court of Appeals Ignored the Language of the RICO Statute and Its History; Its Decision Flies in the Face of Congressional Intent.

A brief review of the developments leading to the passage of RICO indicates how far the court of appeals departed from congressional intent. It also demonstrates the importance of the issue and the need for prompt resolution by this Court.

It is important to note that in October of 1970, Congress enacted two laws significant to the issues presented in this petition. One was the racketeering statute; the other was the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§801-966 (1970).

Prior to the enactment of the 1970 statute which redrafted and reorganized federal drug laws, the United States Code punished three categories of drug offenses: narcotic drugs, marihuana, and depressant or stimulant drugs.[2] Thus, for example, Congress penalized sales of

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[2] The term "depressant or stimulant drug" was defined to include lysergic acid diethylamide (LSD) and other drugs with hallucinogenic effects. 21 U.S.C. §321(v)(3) (Supp. V 1970). This same definition expressly distinguished narcotic drugs and marihuana from the depressant or stimulant drugs: ". . . except that the Secretary shall not designate . . . any substance that is now included, or is hereafter included, within the classifications stated in section 4731 [narcotic drugs], and marihuana as defined in section 4761, of Title 26." *Id.*

narcotic drugs under 21 U.S.C. §174 (1964); sales of marihuana under 21 U.S.C. §176a (1964); and sales of depressant or stimulant drugs under 21 U.S.C. §§331(q)(2) and 333(b) (Supp. V 1970). In this manner Congress not only distinguished narcotic drugs from marihuana, it also distinguished these substances from all other dangerous drugs regulated by federal law.

In 1968 Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§2510-2520 (1970). The statute permitted court-ordered wiretaps and electronic surveillance. In 18 U.S.C. §2516 Congress specified the crimes that could be investigated pursuant to the new legislation. One class of crimes was decribed in §2516(1)(e) as including "any offense involving . . . the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana or other dangerous drugs, punishable under any law of the United States."

The choice of this language is significant, since had Congress not included the words "dangerous drugs" in the legislation, it would have limited the use of the statute in drug cases to the few drugs defined as narcotics and to marihuana. By including the additional language, Congress established that drugs which were regulated by federal law and made subject to criminal prosecution were within the scope of offenses to which the wiretap legislation was directed. The language also indicated that Congress recognized that its prior enactments governing drug offenses had distinguished narcotic drugs from marihuana and these two categories from all other drugs. Congress plainly recognized the need to add the language "dangerous drugs" in order to reach the remaining regulated drugs—*e.g.*, hallucinogens, stimulants and depressants.

Shortly thereafter, Congress decided to revamp federal drug laws, and it enacted the 1970 Controlled Substances Act. This statute adopted the term "controlled substance" to cover all drugs subject to federal regulation. Significantly, however, Congress continued to specifically define both narcotic drugs and marihuana and to make special provision for them. Congress also continued to lump other controlled substances together and not to make special provision for them. Thus, the pre-1970 categories were continued in the 1970 Code, and 21 U.S.C. §§841(b)(1)(A), (b)(1)(B), (b)(2), (b)(3); §842(c)(2)(B); §843(c); §844(b)(1); and §962(b) each referred to ". . . any other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances."

Much of the legislative history of the drug reform statute is found in H. Rep. No. 91-1444, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 4566-4660, which indicates that Congress specifically intended to carry forward its special treatment of narcotic drugs and marihuana. Although Congress chose the term "controlled substances" to cover all drugs within the purview of the new legislation, it specifically provided that, although marihuana and narcotic drugs were within this term, they would have their own separate definitions and special provisions often would govern these substances.

The same Congress that enacted the drug reform statute enacted the RICO legislation during the very same month. RICO authorizes convictions for racketeering activity defined in 18 U.S.C. §1961. Section 1961(1) defines racketeering activity to include "any offense . . . involving . . . buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States." §1961(1)(D).

The word "marihuana" does not appear in the RICO legislation, and its absence is not inadvertent. It was in-

cluded in earlier drafts of RICO which Congress rejected. In 1967, for instance, sec. 2(1) of S. 2049, 90th Cong., 1st Sess., defined "criminal activity" to mean "any act involving . . . importation . . . or otherwise dealing in narcotic drugs or *marihuana* . . . punishable under any statute of the United States" (emphasis added). Identical language was included in sec. 2(1) of S. 1623, 91st Cong., 1st Sess. (1969). The principal drafter of the statute, G. Robert Blakey,[3] who had previously drafted the wiretap portions of the 1968 Omnibus Crime Control and Safe Streets Act, sought to include the word "marihuana" in the RICO statute in the same way it had been used two years earlier.[4] Similarly, Deputy Attorney General Richard Kleindienst suggested to the Senate Subcommittee on Criminal Laws and Procedures that marihuana ought to be covered by RICO. However, a deliberate congressional decision was made to eliminate marihuana from the statute.[5]

Thus, the legislative history of the Controlled Substances Act and of RICO, which were being simultaneously considered, demonstrates that Congress believed there were three major classes of drug offenses: those involving narcotic drugs, those involving marihuana and those involving other dangerous drugs. The three classes are clearly set forth in a portion of H. Rep. No. 91-1446, *supra*, 1970 U.S. Code Cong. & Ad. News 4566, 4640.

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[3] *United States* v. *Lee Stoller Enterprises, Inc.*, 652 F.2d 1313, 1319 n.10 (7th Cir.) (en banc), *cert. denied*, 454 U.S. 1082 (1981).

[4] The legislative history of RICO is traced in detail in Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temp. L. Q. 1009, 1014-21 (1980).

[5] Blakey, *Materials on RICO: Criminal Overview*, 1 Techniques in the Investigation of Organized Crime 24 (Cornell Institute on Organized Crime, Blakey ed. 1980).

At the time it was considering both the RICO and the drug reform legislation, Congress was aware that it had made specific provision for narcotic drugs and marihuana in pre-1970 legislation and that it had treated most other drugs subject to criminal regulation as a separate group. These other drugs were the "dangerous drugs" referred to in the 1968 wiretap statute. The wiretap statute specifically included marihuana, thereby demonstrating that Congress recognized that marihuana and dangerous drugs were in different categories. Congress also was aware that had it wanted marihuana—or all drugs covered by federal law—to be included in the RICO legislation, it could have simply used the term "controlled substance" in the section of the statute defining racketeering acts.[6] This Court has already observed that members of Congress who voted for RICO were aware of the Controlled Substances Act. *Russello* v. *United States*, 104 S.Ct. at 301. Congress intentionally avoided the term "controlled substance" in RICO and thereby specifically declined to include marihuana.

The sole effect of not using the term "controlled substance" was to eliminate marihuana from the coverage of the statute, since all other controlled substances are either dangerous drugs or narcotic drugs and thus within the definition of racketeering activity.

This Court has said in another RICO case, *United States* v. *Turkette*, 452 U.S. 576, 580 (1981), that "[i]n determining the scope of a statute, we look first to its language," and if the language is unambiguous, it is ordinarily regarded as conclusive. A look at the language of RICO

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[6] This is exactly what Congress did throughout the Controlled Substances Act. *See, e.g.*, §§822; 824(a); 825; 826; 827; 841(a)(1); 842(a); 843(a)(2), (3); 844(a); 849(e); 955a; 960(a) of Title 21, United States Code (1970).

reveals that the word "marihuana" is not found. "Marihuana" was included in early drafts of the legislation and its absence is no accident. The plain language of the statute indicates that marihuana offenses are not predicate acts supporting RICO convictions.

In *American Textile Manufacturers Institute, Inc.* v. *Donovan,* 450 U.S. 490, 508-511 (1981), the Court held that when it is clear that Congress knows how to say something and Congress has chosen not to say it, federal courts should not read into a statute more than Congress intended to be there. Additionally, the Court noted in *Russello* v. *United States*: "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." 104 S.Ct. at 300, quoting *United States* v. *Wong Kim Bo,* 472 F.2d 720, 722 (5th Cir. 1972).

Although the 1968 wiretap statute and RICO were not enacted at the same time, both statutes were sponsored by Senator McClellan, both were drafted by Professor Blakey, both were processed through the same Senate subcommittee. As part of a related statutory scheme enacted close in time, the 1968 statute and the RICO legislation should be considered together. *See United States* v. *Sells Engineering, Inc.,* 103 S.Ct. 3133, 3144 (1983).

The only conclusion from such consideration is that Congress meant to do what it did in the 1970 RICO statute: exclude marihuana from its coverage. Of course, Congress could have included marihuana in RICO had it wished, but "[t]he short answer is that Congress did not write the statute that way." *Russello* v. *United States,* 104 S.Ct. at 300, quoting *United States* v. *Naftalin,* 441 U.S. 768, 773 (1979).

The statutory language used by Congress in RICO is consistent with the language it was using while deliberating on the Controlled Substances Act of 1970. Even if the statute were not as clear as it is, its drafting background alone would support only the reading that petitioner asserts. The conscious omission of the word "marihuana" over the protest of Deputy Attorney General Kleindienst and the drafting preference of the principal architect of the statute, Professor Blakey, leads ineluctably to the conclusion that marihuana is simply not within the reach of the statute.

B. The Court of Appeals' Decision Creates the Very Evil That Congress Sought to Avoid.

It is not surprising that Congress would have determined not to include marihuana within RICO. Had it been included, many situations would have fallen within the statute's coverage:

> *Situation* 1. At a college fraternity or sorority party, or at a meeting of a philosophy discussion group or a club of young adults, a member of the group shares marihuana with two friends. Since a fraternity, sorority, discussion group or club may be a RICO enterprise, and since distribution of marihuana would have been a felony in almost every state when RICO was passed,[7] the group member who shared the marihuana could be convicted of racketeering.
>
> *Situation* 2. A husband and wife share marihuana in the privacy of their own home. Since a marriage might be an enterprise (association in fact), if the spouses share marihuana with one another twice, each might be convicted of racketeering as long as state law punished distribution as a felony.

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[7] *See* H. Rep. No. 91-978, 91st Cong., 2d Sess. 92 (1970).

Petitioner does not urge that Congress could not have enacted a statute that would reach these situations and that would punish the activity described as racketeering. Nor does he argue that such a statute would have been uniformly regarded as undesirable when RICO was enacted. Petitioner simply maintains that Congress did not pass such a statute and that it made as clear a statement as it could that it did not want to reach marihuana under the racketeering laws.

Congress provided in 21 U.S.C. §844 (1970) that possession of any controlled substance would be a misdemeanor, unless a person had previously been convicted of violating federal law. Section 844 is significant because it reveals that Congress understood how to use the term "controlled substances" when it wanted to cover all drugs regulated by federal law.[8] It is even more significant to the petitioner's case, because Congress indicated that all drugs would be treated alike when simple possession was charged; *i.e.*, whether a person possessed a drug—any drug—on one, two or twenty occasions, he would be guilty only of misdemeanors unless his possession came after a federal conviction for a drug violation.

At the same time Congress adopted this section in the drug reform statute, it provided in the RICO legislation that certain activity in connection with narcotics and dangerous drugs could be reached; however, it left possession out of the definition of such activity. Thus, the combination of the two statutes meant that not only had Congress provided that possessory offenses regarding all drugs would be federal misdemeanors, but also Congress had limited the reach of RICO so that it would not include simple possessory crimes.

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[8] *See supra* note 6.

While it treated all controlled substances identically insofar as simple possession was concerned, Congress specifically enacted 21 U.S.C. §841(b)(4) (1970), which establishes that a person who violates federal law "by distributing a small amount of marihuana for no remuneration shall be treated" under §844. Thus, Congress determined that simple possession of all drugs would be a misdemeanor but that gifts of any drug except marihuana would be a felony. This demonstrates that Congress paid special attention to marihuana and continued to treat it specially in its 1970 legislation, as it had done prior to 1970.

Under the court of appeals' decision, Congress' careful approach to marihuana is undermined. That decision would interpret RICO so that gifts of small amounts of marihuana in any state which made distribution a felony in 1970—and virtually every state did—could be a predicate offense under 18 U.S.C. §1961(1)(A) (1982). This interpretation has the perverse effect of turning Congress' efforts to remove small gifts of marihuana from the felony offense category into a scheme to punish as racketeers the people described in the two situations above. The fact is that Congress selected marihuana and only marihuana for special treatment in 21 U.S.C. §841(b)(4) (1970), and the special legislation covered small gifts.

Thus, petitioner asks this Court to grant his petition in order to address the important question of how far the federal RICO statute was intended to reach. The court of appeals gave the statute a reach that was not intended by Congress and that is totally inconsistent with the careful approach to marihuana that Congress evidenced in its 1970 drug reform statute.

C. The Court of Appeals Ignored This Court's Decisions Regarding Statutory Interpretation and Substituted Its Preferences for Those of the Congress That Enacted RICO.

Petitioner also asks this Court to grant certiorari because the court of appeals has refused to follow the Court's direction that statutes should be interpreted to further the intent of Congress, not the predilections of judges.

In *McElroy* v. *United States*, 455 U.S. 642, 656 n.21 (1982), this Court declined to accept a petitioner's construction of a statute, even though supported by several lower court decisions. The Court observed that "none of the cases based its holding on an analysis of the language, legislative history, or purpose" of the statute; it further noted that the cases "quoted the pertinent language" of the statute and "held, without analysis or citation to authority," that a certain result was obvious. There could be no more accurate way to describe the manner in which the court of appeals handled the important issue of the scope of RICO in petitioner's case.

The court of appeals, in a footnote rejecting petitioner's argument, relied only upon *United States* v. *Smith*, 574 F.2d 308 (5th Cir.), *cert. denied*, 439 U.S. 931 (1978), and *United States* v. *Phillips*, 664 F.2d 971 (5th Cir. 1981) (Unit B), *cert. denied*, 457 U.S. 1136 (1982). In *Smith*, a summary calendar disposition attached to this Petition at App. 31, the United States Court of Appeals for the Fifth Circuit rejected a defendant's pretrial motion to dismiss an indictment on double jeopardy grounds. It held that prior convictions for conspiracy to distribute marihuana and for possession with intent to distribute did not bar a subsequent RICO prosecution using the marihuana offenses and other non-drug crimes as predi-

cates. Smith never argued that a RICO prosecution could not be predicated solely on marihuana offenses. Rather, he maintained that the previous convictions barred another prosecution—one that, in his view, could have been maintained had there been no prior convictions.

Before the Eleventh and Fifth Circuits split, Unit B of the Fifth Circuit decided *United States* v. *Phillips*, and rejected a claim that was put forward in approximately one double-spaced page of one defendant's (Platshorn's) brief that marihuana was not a narcotic or dangerous drug. The relevant portion of the brief is found at App. 37. The government responded by citing the *Smith* opinion, even though *Smith* had not considered Platshorn's question. The relevant portion of the government's brief is found at App. 38.

Relying on the government's brief, the court decided against Platshorn and disposed of his claim in a single paragraph which simply asserted that "[m]arijuana may be the subject matter of a RICO charge." 664 F.2d at 1040. The only case cited was *Smith*. Ironically, the government had argued that Platshorn should address his claim to Congress rather than to the courts. What Platshorn unsuccessfully tried to do was to have the court construe the statute in the light of congressional intent. This the *Phillips* court declined to do. Instead, it looked to one precedent that was not even in point.

Because the Eleventh Circuit follows Fifth Circuit precedents unless it goes en banc to create new precedent, when petitioner raised his challenge to the RICO prosecution, the Eleventh Circuit disposed of it in a footnote. 734 F.2d at 1462, n.11. App. 39. The only case cited is *Phillips*.

Petitioner asked for a rehearing and urged the court to look at the legislative history, but his request was denied.

App. 29. As a result, one case not in point, followed without analysis by a second case, has produced a rule that controls in the court of appeals: marihuana is covered by RICO.

Surely, the intent of Congress warrants more respect than this. This Court looked to Congress' intent in *Albernaz* v. *United States,* 450 U.S. 333 (1981), in interpreting the Comprehensive Drug Abuse Prevention and Control Act of 1970. The Court looked to Congress' intent in *United States* v. *Turkette,* 452 U.S. 576, in interpreting the RICO statute. The Court returned to Congress' intent just last term in *Russello* v. *United States,* 104 S.Ct. 296, to again construe RICO.

Petitioner asks only that the Court look to Congress' intent in his case as well. Surely legislative intent is not examined only to expand criminal statutes; it is the core of statutory construction. *See, e.g., Busic* v. *United States,* 446 U.S. 398 (1980) (declining to permit enhanced sentencing provision for defendant using firearm in course of felony, where substantive crime provided another enhancement for using dangerous weapon).

CONCLUSION

Petitioner believes that the issues presented in this case are of tremendous importance, especially as the government increases its use of RICO. The approach of the court of appeals to statutory construction denigrates the importance of Congressional intent; it produces exactly the result that Congress sought to avoid.

Petitioner recognizes that no court is likely to welcome a case that raises the possibility that convictions under a major federal statute might have to be overturned. But the scope of the RICO statute is better determined now

rather than later, since a decision that RICO does not reach marihuana offenses will at least assure that future judicial resources are not squandered on improper prosecutions.

If petitioner's argument prevails, the convictions of the underlying marihuana predicates will remain valid. Judicial recognition that Congress did not intend RICO to reach marihuana offenses does not mean that marihuana offenders will escape punishment.

Petitioner asks this Court to grant review and do what the Court of Appeals did not: apply RICO as Congress intended.

Respectfully submitted,

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APPENDIX

APPENDIX 1

UNITED STATES of America,
Plaintiff-Appellee,

v.

Chan Walker ZIELIE, Keith H. Gustafson, Thomas David Wilkerson, Robert Walter Govern, and Leon D. Mausser, Defendants-Appellants.

No. 82-3167.
United States Court of Appeals,
Eleventh Circuit.
June 25, 1984.

Appeals from the United States District Court for the Middle District of Florida.

Before FAY, VANCE and HATCHETT, Circuit Judges.

FAY, Circuit Judge:

This case involves a group of individuals who associated together to profit from a large marijuana distribution network. Thirteen defendants, including the five appellants, were originally charged in an eighteen-count indictment.[1] Following a jury trial appellants were convicted of conspiring to violate and violating the racketeering statutes, 18 U.S.C. §§ 1961, 1962(a), (c) and (d), and 1963 (1980); the Travel Act, 18 U.S.C. §§ 1952(a)(3) and 2 (1980); the federal drug laws, 21 U.S.C. 841(a)(1) and 846 (1980)

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[1] Thirteen people were charged on some or all of the counts in the original indictment. Appellants Govern, Gustafson, Mausser, Wilkerson and Zielie were found guilty by the jury on November 10, 1982. Codefendant Liberatore entered a plea of guilty during the first week of trial. The other defendants in the case either pled guilty prior to trial or remained fugitives.

and 18 U.S.C. § 2 (1980); and the personal income tax laws, 18 U.S.C. § 371 (1980). Each appellant challenges his convictions on numerous grounds. After careful examination of each of their arguments, we affirm each appellant's conviction on each count charged in the indictment, with the exception of the conviction of Robert Govern on Count Twelve, which we vacate.

I. THE FACTS

Robert Govern supervised a large network which distributed multi-ton quantities of marijuana from 1977 until 1982. Tony Fernandez was the head of the importation phase of the operation. Directly under Fernandez was appellant Govern, the head of the American distribution network, who purchased the marijuana from Fernandez and then resold it. Appellant Gustafson and Todd Reynolds worked directly for Govern. Tom Tucker, Steve Liberatore, Emmett Holcomb and appellant Zielie were some of the buyers of Govern's marijuana. These buyers, in turn, had their own employees in the network. Appellant Mausser accepted payments for the marijuana and was part of Govern's money laundering projects.

The evidence showed a highly structured and well-organized distribution network. There were numerous farms used as stash houses in Florida, Georgia and Texas. The money was kept and collected at Govern's Holatee Trail house in Florida. The marijuana was usually distributed in quantities ranging from 28,000 to 32,000 pounds.[2] There was a whole network of drivers. Deliveries and pick-ups could only be made between 8:00 a.m. and

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[2] The enterprise distributed vast amounts of marijuana. For example, in a five month period in 1978 approximately 150,000 pounds of marijuana passed through Govern's Loxahatchee house.

5:00 p.m., Monday through Friday. Employees in the operation had fixed weekly salaries. By late 1978 the distribution network had expanded outside of Florida.

This successful enterprise generated huge amounts of cash. The evidence showed that Govern had a cache of at least $2.5 million. Govern, through an attorney, set up an off-shore corporation named Mexivest, N.V. It served as the conduit for channeling Govern's drug money into an apartment complex and a lumber business. Money was also laundered by many off-the-books and under-the-table transactions with the subcontractors involved in the construction of the apartment complex. From the purchase of the marijuana from Fernandez through the process of channeling the money into other investments, the evidence clearly indicated a group of individuals associated in fact for the purpose of making money through a coordinated and connected series of marijuana transactions.

II. CHAN WALKER ZIELIE'S CLAIMS

A. Speedy Trial Act

Chan Walker Zielie appeals the district court's refusal to dismiss his indictment on the ground that he was denied the right to a speedy trial in violation of the Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1976). Zielie was indicted in this case on April 13, 1982. On April 14, he made his first appearance before a judicial officer in the district where the indictment was returned. The only motions that he filed were a motion for a speedy trial and several motions to be excused from hearings involving his codefendants. The case was set for trial on June 21, 1982.

From April 22, 1982, through June 24, 1982, Zielie's codefendants filed various pretrial motions. On May 28, 1982, the government filed a motion for continuance of the trial date. Zielie objected to the motion and once more de-

manded a speedy trial. Several of his codefendants also filed motions to continue the trial and the district court granted the motions on June 8 to serve the ends of justice. The trial was reset for August 16, 1982. On August 12, 1982 Zielie filed a motion for discharge based upon a violation of the Speedy Trial Act and the district judge denied the motion. Zielie's argument that his right to a speedy trial was violated is based on his inclusion in his computation of the time periods during which various pretrial motions of his codefendants were pending. Yet, by doing this he ignores both Congress' statutory intent and the law in this circuit.

Section 3161(c) of the Speedy Trial Act provides essentially a seventy-day period within which a defendant must be tried.

> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. . . .

18 U.S.C. § 3161(c).

Yet in calculating the seventy day period, Section 3161(h) of the Act excludes time during which certain proceedings involving the defendant or a codefendant are pending. Among these exclusions are three periods of time relevant to this appeal:

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant including but not limited to—

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

. . .

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

. . .

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

[1, 2] The primary purpose of the Speedy Trial Act is to accelerate criminal trials. Congress enacted Section 3161(h)(7) because it recognized that multidefendant trials are desirable for prompt efficient disposition of criminal cases. It stressed that "the purpose of the provision is to make sure that [the Speedy Trial Act] does not alter the present rules on severance of codefendants by forcing the government to prosecute the first defendant separately or to be subject to a speedy trial dismissal motion under Section 3162." S.Rep. No. 93-1021, 93rd Cong., 2d Session (1974). For this reason the rule in this circuit is clear that a time exclusion that applies to one defendant is applicable to all codefendants. *United States* v. *Campbell,* 706 F.2d 1138 (11th Cir. 1983); *United States* v. *Stafford,* 697 F.2d 1368 (11th Cir. 1982); *United States* v. *Varella,* 692 F.2d 1352 (11th Cir. 1982); *United States* v. *Davis,* 679 F.2d 845 (11th Cir. 1982). Even though Zielie may not have triggered any excludable periods of delay by the filing of his own motions, the periods of excludable delay

generated by the motions of his codefendants are attributable to him under Section 3161(h)(7). There was no violation of Zielie's speedy trial rights in this case.

B. Right to be Appointed as Co-Counsel.

Zielie was represented by counsel in this case from the time of his first appearance. On August 12, 1982, four days prior to the beginning of the first trial, Zielie moved to have himself admitted as co-counsel in the case. He believed that most of the trial would relate only to his co-defendant Govern, and he could, therefore, have his counsel attend the trial only on the days that directly involved his case. He would act as his own counsel during the rest of the trial. The trial court denied his motion. He now asserts on appeal that he was denied his sixth amendment right to self-representation by the court's order.

[3, 4] It is settled law that a defendant has the right to represent himself in a criminal trial, *Faretta* v. *California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); 28 U.S.C. § 1654. He also has the right to the assistance of counsel. *Powell* v. *Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). The concept of self-representation has been codified in 28 U.S.C. § 1654 (1980) which states that "[i]n all courts of the United States . . . parties may plead and conduct their own case personally or by counsel. . . ." However, this provision does not give the criminal defendant the right to a hybrid representation, *i.e.,* partly by counsel and partly by himself. Courts have consistently interpreted the statute as stating a defendant's rights in the disjunctive. *United States* v. *Shea,* 508 F.2d 82, 86 (5th Cir.), *cert. denied,* 423 U.S. 847, 96 S.Ct. 87, 46 L.Ed.2d 69 (1975); *United States* v. *Lang,* 527 F.2d 1264 (4th Cir. 1975); *Duke* v. *United States,* 255 F.2d 721 (9th Cir. 1958). The district court did not err in refusing to let Zielie appear as co-counsel.

C. Opening Statement

[5] The second trial[3] in this case commenced on September 20, 1982. The district judge afforded counsel for all parties the opportunity to make an opening statement. Some of the parties chose to make their opening statements at that time. Zielie's counsel did not make his statement then but reserved the right to do so when he presented his case-in-chief. When it was time to present Zielie's case-in-chief his counsel advised the district judge that the only evidence that he would be presenting would be the testimony of co-defendant Govern. Since it quickly became apparent that Govern would invoke his fifth amendment right against self-incrimination, and thus realistically Zielie would not be presenting any evidence, the district judge asked Zielie's counsel if he still wanted to make an opening statement. Zielie's counsel advised the court that he needed an opening statement to explain to the jury general points of law. The district judge then denied his request. Zielie asserts on appeal that the district court's ruling was erroneous and he should be granted a new trial. We disagree.

[6, 7] The purpose of an opening statement "is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole." *United States* v. *Dinitz,* 424 U.S. 600, 612, 96 S.Ct. 1075, 1082, 47 L.Ed.2d 267 (1976). The timing and making of opening statements is within the discretion of the trial judge. *See United States* v. *Salovitz,* 701 F.2d 17, 21 (2nd Cir. 1983); *United States* v. *Hershenow,* 680 F.2d 847, 858 (1st Cir. 1982). He can exclude irrelevant facts and stop argument if it occurs. *See United States* v. *Hershenow,*

[3] The first trial in this case began on August 16, 1982. It ended in a mistrial. See Section IV.

680 F.2d at 858; *United States* v. *Freeman*, 514 F.2d 1184, 1192 (10th Cir. 1975). The Constitution requires that trials be fairly conducted and that "guaranteed rights of defendants be scrupulously respected." *McGautha* v. *California*, 402 U.S. 183, 221, 91 S.Ct. 1454, 1474, 28 L.Ed.2d 711 (1971). However, an opening statement by the defendant is not such a guaranteed right.[4] The making and timing of opening statements can be left constitutionally to the informed discretion of the trial judge. Although failure to afford a defendant the opportunity to make an opening statement can constitute error, *United States* v. *Breedlove*, 576 F.2d 57, 60 (5th Cir. 1978),[5] this is not such a case.

[8] The facts indicate that the government had already rested its case. Defense counsel advised the court that he would call no witnesses and introduce no evidence. Instead, he explained to the court that he needed an opening statement to explain to the jury the presumption of innocence and other basic points of law. Clearly, this is not the purpose of an opening statement. An opening statement gives counsel the opportunity to explain the case to the jury and to outline the proof. "[I]t is not an occasion for argument." *United States* v. *Dinitz*, 424 U.S. at 612, 96 S.Ct. at 1082. The district judge did not err in denying Zielie's counsel the opportunity of making an opening statement.

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[4] The Supreme Court has limited the constitutional right to oral argument to final argument or summation. They have stated that "[t]here is no constitutional right to oral argument at any stage of the trial or appellate process." *Herring* v. *New York*, 422 U.S. 853, 863 n. 13, 95 S.Ct. 2550, 2555 n. 13, 45 L.Ed.2d 593 (1974).

[5] In *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

D. Zielie's Other Motions

Zielie was charged in two counts of the indictment. Count Seven charged that on or about January 13th and 14th, 1979, near Eustis, Florida, Zielie possessed marijuana with intent to distribute. Count Sixteen charged Zielie with conspiracy to possess and distribute marijuana.[6] Zielie filed two separate motions *in limine* and a motion for judgment of acquittal as to both counts. The district judge denied both motions *in limine* and granted the motion for acquittal as to Count Sixteen, the conspiracy count, but denied it as to Count Seven for possession with intent to distribute. Zielie challenges the district court's rulings. Finding no error in these rulings, we affirm Zielie's conviction.

[9] On August 25, 1982, Zielie filed a motion *in limine* seeking to preclude all non-expert witnesses from identifying as marijuana the brown-green, leafy material that he was charged with possessing and distributing. He asserted that none of the marijuana that he allegedly received and distributed had ever been seen, seized or tested by qualified law enforcement personnel or a qualified expert in the field of botany or forensic chemistry; therefore, no testimony identifying it as marijuana should be permitted. We find the court properly allowed Diego Morales and Todd

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[6] Appellants Govern and Wilkerson also challenge their convictions on Count Sixteen arguing that the evidence introduced at trial established a number of separate conspiracies but not the single conspiracy charged in Count Sixteen. There is no merit to this argument. The trial judge properly found that the multiple conspiracy issue was an issue of fact to be resolved by the jury. *United States* v. *Lee*, 695 F.2d 515 (11th Cir. 1983). It submitted it to the jury with an appropriate instruction. R. Vol. XXXVIII at 4745-46.

Reynolds, two experienced marijuana dealers, to testify that the substance given to Zielie on or about January 13-14, 1979, was marijuana.

[10, 11] The law is quite clear that the introduction of a chemical analysis of the substance is not essential to conviction. *United States* v. *Graham*, 464 F.2d 1073 (5th Cir. 1972). The uncorroborated testimony of a person who observed a defendant in possession of a controlled substance is sufficient if the person is familiar with the substance at issue. *See, e.g., United States* v. *Crisp*, 563 F.2d 1242, 1244 (5th Cir. 1977); *United States* v. *Quesada*, 512 F.2d 1043, 1045 (5th Cir.), *cert. denied*, 423 U.S. 946, 96 S.Ct. 356, 46 L.Ed.2d 277 (1975). The narcotic nature of the substance need not be proved by direct evidence if the circumstantial evidence presented established, as it did here, that beyond a reasonable doubt the substance was marijuana. *See, e.g., United States* v. *Gregorio*, 497 F.2d 1253, 1263 (4th Cir. 1974); *United States* v. *Jones*, 480 F.2d 954, 960 n.4 (5th Cir. 1973), *cert. denied sub nom., Stockmar* v. *United States*, 414 U.S. 1071, 94 S.Ct. 582, 38 L.Ed.2d 476 (1974). The district judge properly denied this motion *in limine*.

[12] Zielie also filed another motion *in limine* to exclude all evidence which related to drug transactions between him and government witness Morales that were distinct and separate from the transaction involved in Count Seven. The district judge properly denied the motion and admitted the evidence of the uncharged transactions. It does not matter that these other transactions were not alleged as overt acts in the indictment. Courts have consistently held that "the government is not limited to overt acts pleaded in proving a conspiracy. It may show other acts of the conspirators occurring during the life of the conspiracy." *United States* v. *Perez*, 489 F.2d 51, 70

(5th Cir.), *cert. denied*, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1973). *Accord, United States* v. *Ayres*, 434 F.2d 60 (5th Cir. 1970), *cert. denied sub nom., Sidney* v. *United States*, 401 U.S. 938, 91 S.Ct. 930, 28 L.Ed.2d 217 (1971). In this case, because the evidence of the other transactions was offered to prove the conspiracy charged in Count Sixteen, its admission was proper.

[13] At the close of the government's case-in-chief Zielie moved for acquittal on Counts Seven and Sixteen. The motion was granted for Count Sixteen, the conspiracy charge, but denied for Count Seven, the substantive charge of possession of marijuana with intent to distribute. Zielie argues that his acquittal on the conspiracy count necessarily must result in his acquittal on the substantive count. This argument is clearly wrong since it is not inconsistent for a court to acquit a defendant on a conspiracy count while convicting him on a substantive count. *See, e.g., United States* v. *Palmiotto*, 347 F.2d 223 (2d Cir. 1965); *United States* v. *Wilson*, 342 F.2d 43 (2d Cir. 1965). The jury's verdict on Count Seven was supported by substantial evidence. *United States* v. *Malatesta*, 590 F.2d 1379 (5th Cir.), (*en banc*), *cert. denied*, 440 U.S. 962, 99 S.Ct. 1508, 59 L.Ed.2d 777 (1979). The district judge properly ruled on these three motions.

III. ROBERT WALTER GOVERN'S CLAIMS[7]

A. Statements of Co-Conspirators

Govern challenges the admissibility at trial of out of court statements made by co-conspirators. In advancing this claim Govern argues that the district court erred in both the conduct of the *James* hearing and in the applica-

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[7] Govern also challenged several evidentiary rulings of the trial court and asserted that the government's prosecution of this case violated his due process rights. We find these issues do not warrant discussion.

tion of the "in furtherance of the conspiracy" requirement of Federal Rule of Evidence 801(d)(2)(E). We disagree.

[14, 15] Rule 801(d)(2)(E) provides that a statement is not hearsay if it is offered against a party and is made "by a co-conspirator of a party during the course and in furtherance of the conspiracy." Such statements are admissible, however, only if the government presents substantial, independent evidence showing: (1) that a conspiracy existed, (2) that the defendant and declarant were both members of the conspiracy, and (3) that the statement was made during the course of and in furtherance of the conspiracy. *United States* v. *James*, 590 F.2d 575, 581 (5th Cir.) (*en banc*), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979). *Accord, United States* v. *Yonn*, 702 F.2d 1341 (11th Cir. 1983). The trial court's finding is a factual determination, *United States* v. *Perry*, 624 F.2d 29, 30 (5th Cir. 1980), subject to review under the clearly erroneous standard. *United States* v. *Bulman*, 667 F.2d 1374, 1379 (11th Cir.), *cert. denied*, 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982).

[16] The court in this case held a *James* hearing. The judge allowed the prosecution to present hearsay testimony. Govern asserts that the government cannot prove the conspiracy at a *James* hearing through any kind of hearsay. A reading of *James* clearly discloses the error in appellant's argument. The threshold determination concerning the admissibility of co-conspirator statements is made pursuant to Fed.R.Evid. 104(a). This rule provides that the court "is not bound by the Rules of Evidence except those with respect to privileges." Fed.R.Evid. 104(a). Thus hearsay statements are admissible at the *James* hearing with one *caveat*—the court may not "rely upon the content of the very statement whose admissibility is at issue." *United States* v. *James*, 590 F.2d at 581. Thus, independent

evidence, separate from the hearsay statements, must demonstrate the existence of a conspiracy.

[17, 18] There is extensive independent evidence in this record which sustains the district court's finding of a conspiracy. In reviewing a *James* hearing we may also consider, only against the particular defendant-declarant, the statements that he himself made to others. A defendant's own statements are admissible against him as party admissions under Fed.R.Evid. 801(d)(2)(A). *United States* v. *Hewitt*, 663 F.2d 1381, 1388 (11th Cir. 1981). Thus, a defendant's own statements constitute independent evidence for the purpose of applying the *James* standards as to that particular defendant. Most of the evidence at the *James* hearing in this case was testimony by Diego Morales and John Patterson as to conversations with numerous people, including appellant Govern. The statements made by Govern in furtherance of the conspiracy were properly admissible against him.

B. Sufficiency of the Evidence

Govern argues that the evidence adduced at trial was insufficient to support his convictions on Counts One through Six, Eight, Twelve, Seventeen and Eighteen and the district court erred in denying his motion for judgment of acquittal. After a careful review of the record we affirm the convictions of appellant Govern except for Count Twelve.

[19] Challenges to the sufficiency of the evidence are measured by the standard set out in *United States* v. *Bell*, 678 F.2d 547 (5th Cir. Unit B) (*en banc*), *aff'd on other grounds*, ... U.S. ....., 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983).[8] The court in *Bell* stated that:

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[8] The Eleventh Circuit has adopted as binding precedent decisions of Unit B of the former Fifth Circuit. *Stein* v. *Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

> It is not necesary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided that a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence.

Id. at 549.

We must view the evidence in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), and accept all reasonable inferences and credibility choices by the fact-finder, *United States* v. *Gonzalez*, 719 F.2d 1516, 1521-22 (11th Cir. 1983).

After a careful review of the record we find the evidence presented was clearly sufficient to meet the government's burden and we affirm Govern's convictions on all Counts, except Count Twelve.[9] Count Twelve charged defendant Govern with possession of marijuana with intent to distribute near Eustis, Florida, during November, 1980. The evidence introduced at trial showed that Govern was involved with distribution of marijuana in South Florida but not near Eustis. R.Vol. XXIV at 1695-96. Govern's conviction as to Count Twelve is reversed and his sentence as to this count is vacated.

C. Criminal Forfeiture

Count Two of the Indictment alleged that several parcels of real property, owned in whole or in part by Govern, afforded him a source of influence over the racketeering enterprise described in Count Two. These parcels were, therefore, subject to forfeiture pursuant to 18 U.S.C.

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[9] Government's counsel conceded this point to the court at oral argument.

§ 1963(a)(2) (1980). Govern's mansion, the Loxahatchee house and the Holatee Trail house were forfeited to the United States pursuant to the jury's verdict. Govern now challenges these forfeitures.

Under 18 U.S.C. § 1963(a) (1976), a defendant who

> violates any provision of Section 1962 . . . shall forfeit to the United States (1) any interest he has acquired or maintained in violation of Section 1962, and (2) any interests in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of Section 1962.

In order to have a violation of Section 1962 there must be (1) an enterprise which affects interstate or foreign commerce, (2) a defendant associated with the enterprise, (3) who participated in the conduct of the enterprise's affairs (4) through a pattern of racketeering activity. *United States* v. *Bright,* 630 F.2d 804, 829 (5th Cir. 1980). Appellant asserts that there was no "legal entity" that constituted an enterprise and therefore the property should not have been forfeited to the government. We disagree.

In *United States* v. *Martino,* 681 F.2d 952 (5th Cir. 1982) (*en banc*), the court carefully set forth the legislative history of the Organized Crime Control Act of 1970 and concluded that "Congress' express objective in RICO is to take the profit out of organized crime." *Id.* at 957 (footnote omitted). Congress mandated that "[t]he provisions of [RICO] shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub.L. No. 91-452, § 904(a), 84 Stat. 947 (1970). Based on its careful analysis of the legislative history and faced with a RICO enterprise that was "an association in fact rather than a legal entity," *id.* at 958, the court concluded that "reading an enterprise limitation into § 1963(a)(1) renders that section surplusage." *Id.* at 955, Cf. *United States*

v. *Cagnina,* 697 F.2d 915 (11th Cir. 1983, *cert. denied,* —— U.S. ——, 104 S.Ct. 175, 78 L.Ed.2d 157 (1983) (enterprise can include informal criminal network engaged in racketeering activity.)

[20, 21] Properties that are owned by a RICO participant and used by him to further the affairs of a RICO enterprise afford the owner/participant a source of influence over the enterprise and are thus subject to forfeiture under 18 U.S.C. § 1963(a)(2). The evidence in this case showed that Govern bought these properties during years when he had little reported income. These parcels were used almost exclusively as stash or money-counting houses. They clearly were Govern's contribution to the enterprise described in Count Two and properly forfeited to the United States.

IV. DOUBLE JEOPARDY CLAIM

[22] The original trial in this case began on August 16, 1982, in Ocala, Florida. The government started its case by calling various persons who testified as custodian of record or chain of custody witnesses. Several witnesses identified documentary evidence. The government's first fact witness was Diego Morales, a marijuana dealer. After many hours on the stand the prosecutor asked him on redirect who had accompanied him on a particular trip to one of the marijuana farms. He answered, "Leonel Fernandez. They killed him, can't testify." R.Vol. LII at 208. Immediately, all of the defendants moved for a mistrial which was granted by the district judge. Prior to the second trial all of the defendants moved for dismissal of the indictment on double jeopardy grounds. The district judge denied the motions which he characterized as "frivolous." R.Vol. X at 507-508. All of the appellants once more assert that the indictments against them should be dismissed on double jeopardy grounds. We affirm the district court's ruling.

[23, 24] The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the same offense. *United States* v. *Dinitz,* 424 U.S. 600, 606, 96 S.Ct. 1075, 1079, 47 L.Ed.2d 267 (1976). Where the trial is terminated over the objection of the defendant the test for lifting the double jeopardy bar to a second trial is the "manifest necessity" test first set out by the Supreme Court in *United States* v. *Perez,* 9 Wheat. 579, 580, 6 L.Ed. 165 (1824). The usual situation meeting this standard is the hung jury. But in the case of a mistrial declared at the request of a defendant, "there is a narrow exception to the rule that the Double Jeopardy Clause is no bar to retrial." *Oregon* v. *Kennedy,* 456 U.S. 667, 673, 102 S.Ct. 2083, 2088, 72 L.Ed.2d 416 (1982) (citations omitted).

[25] A defendant's motion for a mistrial constitutes "a deliberate election on his part to forego his valued right to have his guilt or innocence determined before the first trier of fact." *United States* v. *Scott,* 437 U.S. 82, 93, 98 S.Ct. 2187, 2195, 57 L.Ed.2d 65 (1978). If prosecutorial error has occurred which warrants a mistrial, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." *United States* v. *Dinitz,* 424 U.S. at 609, 96 S.Ct. at 1080. Thus, only in "those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial," *Oregon* v. *Kennedy,* 456 U.S. at 679, 102 S.Ct. at 2091, can the Double Jeopardy Clause bar the second trial.

Nowhere in this record can we find that the prosecutor intended to cause a mistrial and subvert the protection afforded to these defendants by the Double Jeopardy Clause.

The government gained no advantage by the mistrial since the evidence adduced at the second trial was the same as that used in the first trial. *See Arizona* v. *Washington,* 434 U.S. 497, 508, 98 S.Ct. 824, 831, 54 L.Ed.2d 717 (1978); *United States* v. *Opager,* 616 F.2d 231, 234 (5th Cir.1980). Nothing in this case indicates the level of conduct necessary for a finding of prosecutorial overreaching. *Compare United States* v. *Kessler,* 530 F.2d 1246 (5th Cir.1976) with *United States* v. *Broderick,* 425 F.Supp. 93 (S.D.Fla.1977). *But cf. United States* v. *Garza,* 603 F.2d 578 (5th Cir.1979). We find appellants' double jeopardy argument to be without merit.

V. COMMUNICATION WITH JURY

[26, 27] On November 8, 1982, after receiving its instructions, the jury retired to deliberate. Shortly thereafter, the jury sent a note to the court which stated: "May we please have a copy of the transcript?" Vol. XXXVIII at 4774. The court, without discussing it with any counsel sent a note back which read: "Transcripts are not normally prepared during a trial, have not been prepared in this case; you must follow your collective recollection of the evidence." *Id.* Appellant Gustafson now alleges that this communication with the jury, without prior consultation with the defendant and his attorney denied Gustafson his right to be present at every stage of his trial. We disagree.

In *Rogers* v. *United States,* 422 U.S. 35, 38, 95 S.Ct. 2091, 2094, 45 L.Ed.2d 1 (1975), the Supreme Court stated the rule which governs this incident:

> In *Fillippon* v. *Albion Vein Slate Co.,* 250 U.S. 76 [39 S.Ct. 435, 63 L.Ed. 853] (1919), the Court observed "that the orderly conduct of a trial by jury essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from

> the time the jury is impaneled until it is discharged after rendering the verdict."[10]

However, the *Rogers* opinion clearly indicated that in some circumstances the error can be harmless. *Rogers* v. *United States,* 422 U.S. at 40, 95 S.Ct. at 2095. This is such a case.

Gustafson has not shown in what manner he was prejudiced. The district court's action was purely ministerial, advising the jury that no transcript was available. He has not challenged the accuracy of the district court's answer, nor could he. We by no means approve of any unjustified jury-court communication without notifying all counsel. But when the judge's answer to the jury's inquiry is distinctly responsive to the question; clearly states the law; and no prejudice is shown, the error is harmless. *United States* v. *McDuffie,* 542 F.2d 236, 241 (5th Cir. 1976).

VI. PROSECUTION'S CLOSING ARGUMENT

[28, 29] Appellants Govern and Gustafson assert that the prosecutor, during rebuttal, made two separate comments which denied them a fair trial. These comments were:

> And if you want to show sympathy don't show it to Mr. Govern because we're picking on him. Show it to people who have suffered the effects of millions of pounds of marijuana. These are the people that need your sympathy.

R.Vol. XXXVII at 4713.

> These people are on trial, and Mr. Govern deserves to be found guilty for everything he did and I'm here to do justice, yes, sir, I am, and I'm also here, contrary

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[10] This principle is also embodied in F.R.Crim.P. 43 which affords the defendant the right to be present at all stages of the trial, from arraignment to the return of the verdict.

> to what Mr. Wilson said, to win. And the reason I want to win with respect to Mr. Govern, because if I win that's justice.

R.Vol. XXXVII at 4714.

The test for determining the existence of prosecutorial misconduct is whether the remarks were improper and prejudicially affected substantial rights of the defendants. *United States* v. *Phillips,* 664 F.2d 971, 1030 (5th Cir.1981) (Unit B), *cert. denied, sub nom. Meinster* v. *United States,* 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982); *United States* v. *Dorr,* 636 F.2d 117, 120 (5th Cir.1981).

In this case, the two remarks were neither improper nor of such a nature that they affected substantial rights of the defendants. Reference during closing argument to the drug problems of society and defendants' roles in such problems are not unduly prejudicial or excessively inflammatory. *See, e.g., United States* v. *Metz,* 608 F.2d 147, 158 (5th Cir.1979). The second comment falls safely on the legal side of the line between improper expression of the prosecutor's opinion and appropriate conclusions to be drawn from the evidence. *See United States* v. *Siegel,* 587 F.2d 721, 727 (5th Cir.1979). These remarks did not prejudicially affect substantial rights of the appellants and thus do not constitute reversible error.

VII. REMARKS MADE BY MAUSSER'S COUNSEL

[30] During closing argument counsel for defendant Mausser made the following comment to the jury:

> And he, the evidence we've proven, he's an honest and trustworthy man. He's one of the few who's testified. He stood up there and the prosecution worked him over. He was on that stand for a whole afternoon to defend his name.

R.Vol. XXXVII at 4639.

Counsel for codefendant Gustafson, joined by counsel for codefendant Wilkerson, made a motion for mistrial, asserting that it was an impermissible comment upon their client's failure to testify. Counsel for Mausser apologized for his remark by stating:

> Your honor, I was trying to bring out a point there and I guess—it was about the quantity of witnesses over quality, and I didn't even realize what I said and I didn't know even know about it till afterwards, and I certainly respectfully say to the Court and to all the other defendants and lawyers and the prosecutor, that I did not mean it that way and I had no intention ever to go in that area.

R.Vol. XXXVII at 4642.

The court, thereafter, denied the motion because it concluded that any reference to the codefendants' failure to testify was unintentional and of such a character that the jury would not necessarily take it to be a comment on the codefendants' failure to testify. R.Vol. XXXVII at 4646-4647. The district judge applied the proper standard and we affirm his denial of the motion for a mistrial.

[31] There is no doubt that this circuit has a clearly established rule that convictions can be overturned where a comment on a defendant's exercise of his right to remain silent impairs the integrity of that right. This is true whether the comment is made by the prosecutor or by counsel for a codefendant. *See, United States* v. *Aguiar,* 610 F.2d 1296, 1302 (5th Cir. 1980), *cert. denied,* 449 U.S. 827, 101 S.Ct. 91, 66 L.Ed.2d 31 (1981); *United States* v. *Kaplan,* 576 F.2d 598, 600 (5th Cir.1978), *cert. denied,* 439 U.S. 1078, 99 S.Ct. 858, 59 L.Ed.2d 47 (1979). However, not every statement is a comment on silence.

[32] The standard for determining if there has been an impermissible comment upon a defendant's right not to testify at trial is "whether the statement was manifestly intended or was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of an accused to testify." *United States* v. *Dearden,* 546 F.2d 622, 625 (5th Cir.), *cert. denied,* 434 U.S. 902, 98 S.Ct. 295, 54 L.Ed.2d 188 (1977); *United States* v. *Vera,* 701 F.2d 1349, 1362 (11th Cir.1983). In applying this test, the court must "look to the context in which the statement was made in order to determine the manifest intention which prompted it and its natural and necessary impact upon the jury." *United States* v. *Forrest,* 620 F.2d 446, 455 (5th Cir.1980), *quoting Samuels* v. *United States,* 398 F.2d 964, 967 (5th Cir.), *cert. denied,* 393 U.S. 1021, 89 S.Ct. 630, 21 L.Ed.2d 566 (1969).

Applying the appropriate standards to the statement in this case it is clear that it was not manifestly intended, nor would a jury rationally and necessarily construe it to be, a comment on silence. The statement was an attempt to bolster Mausser's testimony and to enhance his credibility. *See United States* v. *Macker,* 608 F.2d 223, 226-27 (5th Cir. 1979). The Fifth Circuit has stated that:

> A mere favorable comment upon the fact that one of several co-defendants testified does not involve the same potential for prejudice as an adverse comment by counsel upon the failure to testify of the other co-defendant.

United States v. *Hodges,* 502 F.2d 586, 587 (5th Cir.1974). The statement at issue here is a favorable comment on the fact that Mausser testified and not an adverse comment on Gustafson's or Wilkerson's failure to testify.

VIII. RICO CONVICTIONS

[33-35] Appellants Govern, Gustafson and Wilkerson challenge the district's court's denial of their motions for judgment of acquittal.[11] They claim that there was insufficient evidence at trial to support convictions under 18 U.S.C. §§ 1962(c) and (d) (1976) ("RICO").[12] Specifical-

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[11] Gustafson and Govern also challenged the denial of the motions for judgment of acquittal on the RICO charges on two other grounds. First, they argue that marijuana is not a dangerous drug as that term is used in 18 U.S.C. § 1961(1) (1976). This argument has been made to this court before and rejected. *See, e.g., United States* v. *Phillips*, 664 F.2d 971, 1040 (5th Cir. 1981) (Unit B), *cert. denied sub nom, Meinster* v. *United States*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982). Secondly, appellant Govern asserts that the application of the RICO statute to this case is improper because the only acts of racketeering alleged in the indictment were possession and distribution of marijuana and interstate travel to promote the same. Again, the argument is without merit since 18 U.S.C. § 1961(1) states that trafficking in dangerous drugs is a racketeering activity. 18 U.S.C. § 1962(c) states that a RICO violation will lie when a person participates in or conducts a RICO enterprise's affairs through a pattern of racketeering. Therefore, once an enterprise has been established two Title 21 drug offenses would be sufficient to sustain a conviction under RICO.

[12] 18 U.S.C. § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(d) makes it unlawful for any person to conspire to violate § 1962(c). The statute provides that " 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). A "pattern

(footnote continued)

ly they argue that the government failed to establish the existence of an "enterprise," within the meaning of the RICO statute, separate and apart from the underlying pattern of racketeering activity. Both the law and the facts of this case defeat their argument.

In *United States* v. *Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), the Supreme Court held that a RICO enterprise could be engaged solely in illegitimate activity without fusing the enterprise with the pattern of racketeering activity. In reaching its decision the Court discussed the elements of RICO and the meaning of the word "enterprise" under the statute. It stated:

> That a wholly criminal enterprise comes within the ambit of the statute does not mean that a 'pattern of racketeering activity' is an 'enterprise.' In order to secure a conviction under RICO, the Government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity.' The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute [citation omitted]. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The

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(footnote continued)
of racketeering activity" requires at least two acts of "racketeering activity" committed within ten years of each other. 18 U.S.C. § 1961 (5). "Racketeering activity" includes three broad categories of crimes: (a) any of several specified "act[s] or threat[s] . . . chargeable under State law and punishable by imprisonment for more than one year", including, as relevant here, murder, attempted murder, arson, extortion, and dealing in narcotics, (b) any act which is indictable under any of several specified sections of 18 U.S.C., including § 472 (issuing counterfeit securities) and § 659 (felonious theft from interstate shipment), and (c) federal offenses involving narcotics or other dangerous drugs.

> latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other.

452 U.S. at 583, 101 S.Ct. at 2528.

[36, 37] Thus, in order to prove a substantive RICO violation the government must prove both an enterprise and a pattern of racketeering activity. *United States* v. *Cagnina,* 697 F.2d 915 (11th Cir. 1983), *cert. denied,*—— U.S. ——, 104 S.Ct. 175, 78 L.Ed.2d 157 (1983). A pattern of racketeering activity alone is not a crime under RICO. The gravamen of a RICO offense is conducting an enterprise through a pattern of racketeering activity. *United States* v. *Elliott,* 571 F.2d 880 (5th Cir.), *cert. denied,* 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978). This circuit has interpreted "enterprise" to mean "an informal criminal network engaged in racketeering activity . . ." *United States* v. *Cagnina,* 697 F.2d at 920. An enterprise need not be a "duly formed corporation that elects officers and hold annual meetings . . ." *United States* v. *Elliott,* 571 F.2d at 898. It can be a loose and informal "amoeba-like infrastructure that controls a secret criminal network . . ." *Id.* The precedent in this circuit clearly indicates that "a RICO enterprise exists where a group of persons associate, formally or informally, with the purpose of conducting illegal activity." *United States* v. *Hewes,* 729 F.2d 1302 at 1311 (11th Cir. 1984).

[38] There was sufficient evidence in this case for the jury to find a RICO "enterprise" as that term has been interpreted by the Supreme Court and this circuit. The indictment in this case alleged that there was an enterprise consisting of a group of individuals associated in fact for the purpose of distributing marijuana. The evidence clearly

showed that Govern would buy marijuana and redistribute it through the organization that he headed. This distribution group was an ongoing organization, possessing a well-defined structure, with continuity of membership and purpose. R.Vol. XXV at 1936. Testimony at trial showed a structure with extensive records. R.Vol. XXVII at 2567-68. There were fixed salaries, R.Vol. XXVII at 2563, and fixed hours of operation. R.Vol. XXVII at 2453. The evidence clearly indicated that appellants were members of a group of individuals associated in fact for the purpose of making money through a coordinated and connected series of marijuana transactions. Such evidence was sufficient to establish an enterprise under 18 U.S.C. § 1962(c) and (d).

IX. MOTIONS TO SEVER

[39] Appellants Gustafson, Mausser and Wilkerson assert that the trial court erred in denying their respective motions to sever. All three claim error on the part of the trial court for its failure to sever Counts Seventeen and Eighteen, the money laundering counts, from the rest of the Indictment. Appellants Mausser and Wilkerson also claim that they should have been tried separately from all other codefendants in light of the small amount of evidence introduced against them versus the vast amounts introduced against all other codefendants. Since the appellants have not shown that they suffered any compelling prejudice as a result of the joint trial we affirm the district court's denial of the motions to sever.

[40] It is well settled that joinder under Rule 8(b)[13] is proper where an indictment charges multiple defendants with participation in a single conspiracy and also charges

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[13] Fed.R.Crim.P. 8(b) provides in pertinent part:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

some but not all of the defendants with substantive counts arising out of the conspiracy. *United States* v. *Weinrich,* 586 F.2d 481, 495 (5th Cir.1978), *cert. denied,* 441 U.S. 927, 99 S.Ct. 2041, 60 L.Ed.2d 402 (1979). The Fifth Circuit has stated as policy that "Rule 8 is to be broadly construed in favor of initial joinder." *United States* v. *Park,* 531 F.2d 754, 761 (5th Cir. 1976).

[41-44] Yet, even if initial joinder is proper, severance may be granted in the discretion of the trial court under Rule 14[14] if the district court determines prejudice will result from the joinder. *United States* v. *Walker,* 720 F.2d at 1533; *United States* v. *Berkowitz,* 662 F.2d 1127 (5th Cir.1981) (Unit B). In deciding a Rule 14 motion for severance the trial court must balance the right of a defendant to a fair trial against the public's interest in efficient and economic administration of justice. *United States* v. *Walker,* 720 F.2d 1527 (11th Cir. 1983); *United States* v. *Morrow,* 537 F.2d 120, 136 (5th Cir.1976), *cert. denied,* 430 U.S. 956, 97 S.Ct. 1602, 51 L.Ed.2d 806 (1977). Severance will be granted only if a defendant can demonstrate that a joint trial will result in specific and compelling prejudice to the conduct of his defense. *United States* v. *Marzalkowski,* 669 F.2d 655, 660 (11th Cir.), *cert. denied, sub nom., Brock* v. *United States,* 459 U.S. 906, 103 S.Ct. 208-09, 74 L.Ed.2d 167 (1982). Appellate courts are reluctant to second guess a trial court's refusal to grant a severance.

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[14] Fed.R.Crim.P. 14 provides in pertinent part:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trial of counts, grant a severance of defendants or provide whatever other relief justice requires.

United States v. *Horton*, 646 F.2d 181, 186 (5th Cir.1981). Therefore, our review is limited to determining if there was an abuse of discretion. *United States* v. *Plotke*, 725 F.2d 1303, 1309 (11th Cir.1984).

[45, 46] In order to demonstrate an abuse of discretion, "the defendant must establish that the joint trial subjected him not just to some prejudice, but to compelling prejudice against which the district court could not afford protection." *United States* v. *Harper*, 680 F.2d 731, 733 (11th Cir.), *cert. denied*, 459 U.S. 916, 103 S.Ct. 229, 74 L.Ed.2d 182 (1982). In determining prejudice we must consider whether the jury could "individualize each defendant in his relation to the mass," *Kotteakos* v. *United States*, 328 U.S. 750, 773, 66 S.Ct. 1239, 1252, 90 L.Ed. 1557 (1946), *i.e.*, whether the jury could "keep separate the evidence that is relevant to each defendant, and render a fair and impartial verdict as to him? If so, though the task is difficult, severance should not be granted." *United States* v. *Lane*, 584 F.2d 60, 64 (5th Cir.1978), *quoting Tillman* v. *United States*, 406 F.2d 930, 935 (5th Cir.), *vacated in part*, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969). A defendant does not suffer compelling prejudice simply because much of the evidence at trial is applicable only to his codefendants. *United States* v. *Berkowitz*, 662 F.2d at 1135 n. 8. Nothing in this record demonstrates compelling prejudice and the denials of the motions for severance were not an abuse of discretion.

The convictions and sentences imposed on appellants Zielie, Gustafson, Wilkerson and Mausser are AFFIRMED. The convictions of appellant Govern are AFFIRMED except for Count Twelve which is dismissed and the sentence on this Count is VACATED.

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-3167

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHAN WALKER ZIELIE,
KEITH H. GUSTAFSON,
THOMAS DAVID WILKERSON,
ROBERT WALTER GOVERN,
and LEON D. MAUSSER,

Defendants-Appellants.

Appeal from the United States District Court for the
Middle District of Florida

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion June 25, 1984, 11 Cir., 198...., ...F.2d .....)
(July 30, 1984)

Before FAY, VANCE and HATCHETT, Circuit Judges.
PER CURIAM:

(✓) The Petition of Keith H. Gustafson for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested

that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition of Keith H. Gustafson for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ *Peter Fay*
United States Circuit Judge

APPENDIX 3

UNITED STATES of America,
Plaintiff-Appellee,

v.

Samuel S. SMITH, Defendant-Appellant.

No. 78-1508
Summary Calendar.*

United States Court of Appeals, Fifth Circuit.
June 5, 1978.

Before RONEY, GEE and FAY, Circuit Judges.

PER CURIAM:

This appeal is taken from an order of the district court denying appellant's pretrial motion to dismiss the indictment against him on double jeopardy grounds. We affirm.

Appellant, a former circuit judge in the State of Florida, was convicted in April 1977 of conspiracy to distribute marijuana (21 U.S.C.A. § 846) and possession of marijuana with intent to distribute (21 U.S.C.A. § 841(a)(1)). His appeal is presently pending before this Court. In November 1977 appellant was indicted, with others, for conspiracy to conduct and participate in the affairs of the Third Judicial Circuit of the State of Florida through racketeering activity (18 U.S.C.A. § 1962(d)) and the substantive offense of racketeering (18 U.S.C.A. § 1962(c)).

[1] Prior to trial on the racketeering indictment, appellant unsuccessfully moved to dismiss the indictment on double jeopardy grounds. The district court's pretrial denial of appellant's motion falls within the "collateral

order" exception to the final judgment rule first announced in *Cohen* v. *Beneficial Ind. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), and is an appealable "final decision" within the meaning of 28 U.S.C.A. § 1291. *Abney* v. *United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

[2] The double jeopardy clause provides three related protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

United States v. *Wilson*, 420 U.S. 332, 343, 95 S.Ct. 1013, 1021, 43 L.Ed.2d 232 (1975), *quoting North Carolina* v. *Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Appellant seeks to invoke the second of these protections. In support of his double jeopardy claim, appellant notes that of the 72 overt acts alleged in this indictment, 5 relate to attempts to bribe or enlist the aid of state officials in obtaining marijuana. Since these acts had also been alleged to support his earlier marijuana conspiracy conviction, appellant argues that the present prosecution is for the "same offense" charged in his previous marijuana trial.

[3] The classic test for determining whether two offenses are "the same" for double jeopardy purposes was announced in *Blockburger* v. *United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). *Blockburger* requires that each offense be examined to ascertain "whether each provision requires proof of an additional fact which the other does not." *Id.* at 304, 52 S.Ct. at 182; *Brown* v. *Ohio*, 432 U.S. 161, 168, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); *Jeffers* v. *United States*, 432 U.S. 137, 151, 97 S.Ct.

2207, 53 L.Ed.2d 168 (1977). Under the *Blockburger* test, also known as the "same evidence" rule, it is possible for a single criminal act or conspiracy to give rise to multiple separate offenses. See *Gore* v. *United States,* 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958) (defendant convicted and received consecutive prison terms for three separate offenses arising out of single narcotics sale); *United States* v. *Houltin,* 525 F.2d 943 (5th Cir. 1976) (single conspiratorial agreement violated two specific conspiracy statutes; defendant's consecutive sentences affirmed), *vacated on other grounds sub nom. Croucher* v. *United States,* 429 U.S. 1034, 97 S.Ct. 725, 50 L.Ed.2d 745 (1977). Application of the test focuses on the statutory elements of the offenses charged. "If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Iannelli* v. *United States,* 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 1294, 43 L.Ed.2d 616 (1975). A cursory examination of the offenses involved here reveals that they are not the same.

[4] The instant indictment charges appellant with violations of the Racketeer Influenced and Corrupt Oganizations Act (RICO), 18 U.S.C.A. §§ 1961 *et seq.* Count Two charged appellant with violation of § 1962(c), which makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises's affairs through a pattern of racketeering activity or collection of unlawful debt." Count One charged appellant and others with conspiring to violate § 1962(c), a violation of § 1962(d). A "pattern" of racketeering activity is defined under the Act as "at least two acts of racketeering activity. . . ." 18 U.S.C.A. § 1961(5). "Racketeering activity" is defined to include particular listed crimes in-

dictable under federal or state law and traditionally associated with organized crime. *See* 18 U.S.C.A. § 1961(1). The RICO indictment in this case charges bribery of state officials, which qualifies as a "racketeering activity" under § 1961(1)(A), and acts relating to obstruction of justice and obstruction of a criminal investigation, which both qualify as racketeering activity under § 1961(1)(B). Although some of the bribery allegations relate to appellant's alleged involvement with marijuana, the RICO indictment does not allege the drug offenses as an independent "racketeering activity," as it could have under § 1961(1)(D).

Obviously, successful prosecution of the crimes charged under RICO will require proof of several facts that need not be proved under the marijuana offenses. To succeed on the substantive RICO count, Count Two, the Government must prove the existence of an "enterprise," that the enterprise engages in or its activities affect interstate or foreign commerce, and that appellant participated in the enterprise's affairs through at least two acts of bribery of state officials, obstruction of justice, or obstruction of a federal criminal investigation. The Government need not prove any of these facts in order to secure a conviction for possession of marijuana with intent to distribute under 21 U.S.C.A. § 841(a)(1).

To convict under the RICO conspiracy count, the Government must prove, in addition to the enterprise's nexus with interstate or foreign commerce, that appellant "objectively manifested an agreemnt to participate, directly or indirectly, in the affairs of [the] enterprise *through the commission of two or more predicate crimes.*" *United States* v. *Elliot,* 571 F.2d 880 (5th Cir. 1978) (emphasis in original). The RICO conspiracy offense and the marijuana conspiracy offense do share one common element:

an agreement—the essence of the crime of conspiracy—must be shown to secure a conviction under both statutes. But the resemblance ends there.

Similarly, successful prosecution of the marijuana offenses requires proof of an essential fact not required for conviction under the RICO counts: marijuana involvement. Clearly, the RICO offenses involved in this case are not the same as the narcotics offenses for which appellant was convicted in an earlier trial.

Nor can appellant avail himself of the "continuing offense" rule recently applied in *Brown* v. *Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). In *Brown* the Supreme Court held that under Ohio law the crimes of auto theft and joyriding are the same offense for double jeopardy purposes. The Court rejected the contention that defendant could nevertheless be subjected to successive prosecutions for the crimes because the charges against him focused on different parts of his 9-day joyride: "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Id.* at 169, 97 S.Ct. at 2227.

Here, we are not faced with a single criminal act that occurs over a period of time. Indeed, the substantive offenses charged in this case do not even involve the same type of criminal activity. That appellant's alleged marijuana transaction may have been conducted concurrently with the alleged acts of bribery, obstruction of justice, and obstruction of criminal investigations hardly renders it a mere spatial unit in a single continuous offense.

Likewise, appellant's reliance on *Braverman* v. *United States*, 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23 (1942), is

misplaced. In *Braverman* the Court dealt with a single agreement to commit acts in violation of seven substantive statutes. Defendants were charged with and convicted of seven counts of conspiring to violate a separate and distinct law. The Supreme Court held that defendants could be punished for only one offense: "The single agreement is the prohibited conspiracy, and however diverse its objects, it violates but a single statute, § 37 of the Criminal Code [now 18 U.S.C.A. § 371]. For such a violation, only the single penalty prescribed by the statute can be imposed." *Id.* at 54, 63 S.Ct. at 102.

[5] *Braverman* is inapplicable to the instant case because, assuming the marijuana conspiracy is a part of the larger "enterprise" conspiracy alleged under RICO, an issue which cannot be resolved on the record before us, the conspiracy alleged here violates two specific conspiracy statutes. A single criminal conspiracy, no less than a single criminal act, may constitute two or more separate offenses, and Congress may choose to punish each offense without offending the double jeopardy clause. *See United States* v. *Houltin,* 525 F.2d 943, 950-51 (5th Cir. 1976). As we concluded earlier, the marijuana conspiracy and the RICO conspiracy, even if parts of a single larger conspiracy, are separate offenses; and by enacting both 21 U.S.C.A. § 846 and 18 U.S.C.A. § 1962(d), Congress clearly intended to punish them separately.

The instant prosecution under RICO does not violate appellant's double jeopardy rights. Accordingly, the district court did not err in denying appellant's motion to dismiss.

AFFIRMED.

APPENDIX 4

B. THE RICO STATUTE IS INAPPLICABLE TO MARIJUANA OFFENSES.

Very simply stated, marijuana offenses are not properly within the ambit of the RICO statute because marijuana is neither a "narcotic" nor a "dangerous drug." Title 18 U.S.C. §1961(1)(D) limits the scope of the statute to "any offense involving . . . the felonious manufacture, importation, receiving, concealment, buying, selling or otherwise dealing in narcotic or other *dangerous drugs.*"

The definition of narcotic drug is contained in 21 U.S.C. §802(16). No mention is made of marijuana, which is defined in §802(15). *See United States* v. *Kiffer,* 477 F.2d 349 (2nd Cir. 1973). Further, while there is no definition of "dangerous drug" anywhere in the code, it is doubtful that marijuana is sufficiently hazardous to be classified as dangerous. *See National Organization for Reform of Marijuana Laws* v. *Drug Enforcement Administration,* 559 F.2d 735, 751 n.70 (D.C. Cir. 1977); *President's Advisory Commission on Narcotic and Drug Abuse, Final Report* 35 (1963); *President's Commission on Law Enforcement and Administration of Justice, the Challenge of Crime in a Free Society,* 214-216 (1967); Blakey, *Materials on RICO: Criminal Overview,* 1 Cornell Inst. on Organized Crime, Techniques in the Investigation and Prosecution of Organized Crime 24 (1980).

Further, the legislative history of the statute supports the conclusion that it was the intention of Congress to exempt marijuana offenses from its tentacles. *See* Tarlow: *RICO; The New Darling of the Prosecutor's Nursery,* 49 Fordham L. Rev. 165, 222-223 (1980).

(Brief of Platshorn at 34-35).

APPENDIX 5

D. Platshorn's contention that marijuana cannot be the subject matter of a RICO conspiracy is frivolous. *See United States* v. *Smith,* 574 F.2d 308 (5th Cir.), *cert. denied,* 439 U.S. 931 (1978). His argument is premised upon the long rejected view that marijuana should not be classified as a dangerous drug. Platshorn's argument should be addressed to Congress, which has made the classification, rather than the courts. *United States* v. *Erwin,* 602 F.2d 1183, 1185 (5th Cir. 1979), *cert. denied,* 444 U.S. 1071 (1980); *United States* v. *Gramlich,* 551 F.2d 1359, 1364 (5th Cir.), *cert. denied,* 434 U.S. 866 (1977); *United States* v. *Jones,* 480 F.2d 954, 960 (5th Cir.), *cert. denied,* 414 U.S. 1071 (1973).

(Brief of Government at 32-33).

APPENDIX 6

C. Platshorn

Platshorn claims that marijuana offenses are not within the ambit of RICO because marijuana is not a narcotic or dangerous drug. However, marijuana has been classified as a Schedule I controlled substance. *See, e.g., United States* v. *Erwin,* 602 F.2d 1183, 1185 (5th Cir. 1979), *cert. denied,* 444 U.S. 1071, 100 S.Ct. 1014, 62 L.Ed. 2d 752 (1980). Marjuana may be the subject matter of a RICO charge. *See United States* v. *Smith,* 574 F.2d 308 (5th Cir.), *cert. denied,* 439 U.S. 931, 99 S.Ct. 321, 58 L.Ed. 2d 325 (1978), *subsequent appeal sub nom. United States* v. *Stratton,* 649 F.2d 1066 (5th Cir. 1981).

(664 F.2d at 1039-40).